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IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1881.

No. 948.

MARY E. BARRETT,
Appellant,
vs.
CHARLES D. FAILING AND
XARIFA J. FAILING,
Appellees.

Brief and Argument of Appellant.

W. W. CHAPMAM, SOL., AND
W. S. BEEBE AND SIDNEY DELL,
Of Counsel for Appellant.

PORTLAND, OREGON:
A. G. WALLING, STEAM PRINTER AND BOOKBINDER.
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STATEMENT.

This is a suit in equity in the Circuit Court of the United States for the District of Oregon, by appellant for partition, for declaring a trust, for an account and lien, upon the west half of lots 7 and 8, block 63, City of Portland.

Appellant claims to be the owner of an undived third of said real estate. The amended bill filed on the 21st day of May 1881, alleges that appellant, a citizen and resident of California, and one Charles Barrett, were husband and wife on September 25th, 1866, when she commenced a suit for divorce in the proper court in California, against defendant, that defendant appeared and made defense thereto, and that on the 18th day of April, 1870, a decree at her prayer was made by said Court, declaring said marriage dissolved; and that she was, at the time of said decree, a citizen of said State of California; that at the time of said decree, said Charles Barrett was the owner of said real estate but had, pending said divorce, fraudulently transferred said property to his daughter Xarifa J. one of the defendants, the wife of Charles D. Failing, and the bill prayed a decree

declaring complainant the owner of the undivided one-third of said real estate, and entitled to one-third of the profits thereof from said decree of divorce, and for a partition, and for a lien on the other two-thirds. To this amended bill defendantfiled a general demurrer, which was sustained by the Court, and the bill was dismissed, and complainant appealed.

THE QUESTIONS STATED.

The following questions were involved in said demurrer, as is shown by the statement above:

First Whether when a marriage is declared dissolved by a decree of the Circuit Court of Oregon, wherein no mention of real estate is made, the party at whose prayer such decree was made, is entitled to an undivided one-third of the real estate, owned by the other party in this State, at the time of such decree, without an order or decree of that Court so declaring. That is, whether the title passed by the judgment of the Court transferring the specific property, or whether it passed by operation of law upon the happening of the condition precedent prescribed by the Oregon statute, viz.: a decree of divorce at the prayer of a party. The Court below held, with camplainant, that the title, in such case, passed by operation of law and without any mention of the land in the decree or in the pleadings. Of which decision complainant highly approved, and said decision has been twice, since, affirmed by the Supreme Court of the State of Oregon, and is now the settled law of this State. See 8 Or. 522, and a late unreported case.

Second. Whether the same rule of law applied to a similar divorce obtained on full jurisdiction in the State of California. The circuit court held that it did not; and of that decision, appellant highly disapproved.

Note. Ownership of land at the time of the decree of divorce, embraces equitable as well as legal ownership. Principle settled in 5 Oregon, 469.

ASSIGNMEMT OF ERROR.

Appellant alleges that the circuit court committed error in sustaining defendant's demurrer and in rendering the decree, dismissing the bill for want of equity. Said decree is erroneous in that it is based on the proposition that the same rule of law affecting title to realty resulting from a divorce in this State does not apply in case of a divorce obtained by a citizen of the State of California, in the courts of the latter State on full jurisdiction.

BRIEF AND ARGUMENT.

On Construction of the Statute Sec. 495, Or. Civil Code.

THE QUESTION STATED.

A wife domiciled in California obtained a divorce in 1870 from her husband resident in this State, he appearing in the California court, where suit was pending, and making full defense. Her husband owned realty in Oregon, but nothing was said about it in the pleadings nor in the decree. The law of Oregon (Sec. 495, herein to be construed) as amended in 1865, provided as follows:

"Whenever a marriage shall be declared * * * dissolved, the party *at whose prayer* such decree shall be made shall *in all cases*, be entitled to the undivided one-third part in his or her individual right, in fee, of the whole of the real estate owned by the other at the time of such decree."

It is admitted and settled by this circuit court, as well as by the Supreme Court of Oregon, that it is a rule of property in this State that the prevailing party, on the dissolution of the marriage by divorce decree in our courts, at once, by virtue of the happening of the condition precedent, to-

wit, dissolution of the marriage by decree, obtains a legal title to the third, whether the land is mentioned in the pleadings or not. Whether that statute admits or excludes the prevailing party in a decree in a court of a sister State dissolving the marriage is the question now to be considered.

THE CONDITION PRECEDENT.

The sole condition precedent is that the one asserting the title shall have obtained a *dissolution of the marriage* by decree of divorce. Manifestly no other condition is imposed, either expressly or by implication, in the *language* of the Statute. At the same time the Statute points out expressly and by implication the *sort of decree* that will create a dissolution of the marriage, and whenever that sort of decree is rendered it entitles to thirds *because* it dissolves the marriage, and therefore establishes the sole condition precedent to its vesting. FIRST.—It must be by decree or judicial sentence; divorces by the legislature or by voluntary separation in a state of nature will not create the required status. SECOND.—The use of the words, "the other party," implies that it must not be *ex parte*, but on full jurisdiction, as was the case in 9 Wall., 108. THIRD.—The words, "at whose prayer," imply that there must be a judicial contention about the violation of the marital duties (prescribed by the law of the domicile, for no other law governs those duties) and a "decree" determining who is the wrongdoer, and not on consent without a cause alleged and proved. No other qualification is placed on the decree; to add others would be judicial legislation; and whenever it fulfills these requirements it is such a dissolution as to both parties as entitles the prevailing party to thirds. Other divorces may work a dissolution of the marriage as to one or both parties, but to no

other is accorded this right as flowing from the status of divorce.

There is no condition precedent as to the *cause* for which the divorce shall be decreed, except that it shall be for some cause recognized by the *lex dom.* and not by consent. This was distinctly declared by the learned Court (Deady, J.) on the argument. Prior to 1865, one of two causes was made a condition precedent, but the amendment omitted all conditions as to "cause" and substituted the most general words in the language, "in all cases." If it had been desirable to limit it to such decrees as were rendered for causes prescribed by our Statute the words used would have been "for the causes herein specified." But the Statute simply "implies" that it shall be for a cause prescribed by the *lex domicilii.* It is that law alone which prescribes their marital duties and obligations. One domicile has no lawful (though possibly a sentimental or speculative) concern with the grounds of divorce in another domicile. So says Mr. Bishop (2 B. M. and D., §754): "It is quite immaterial whether or not a foreign divorce be for a cause allowed by the domestic law," citing 10 Mass., 260. Each State or domicile regulates that to suit its pleasure (2 B. M. and D., § 137, citing 10 How., 82) and all other States recognize their grounds of divorce or regulations of marital obligations as binding and creating liabilities which we respect and enforce. This was settled in Barrett vs. Barrett, 5 Oregon, 411, and 9 Wall., 108, in each of which cases the transfer of property in one State after the breach of the marital rights in another State entitling to divorce was held fraudulent; recognizing in the clearest manner that the marital *duties* were regulated by the *lex domicilii* alone, and created rights which our courts will enforce. Indeed, the U. S. Constitution requires us to conclusively presume a lawful

cause of divorce upon a decree of a sister State, and to give to it the same effect here as it has there. Hence it is consonant with general principles that our statute should not limit the conditions precedent to such causes of divorce as our law prescribed; and the implied provision that there must be a "cause" of injury does, by our law, embrace such as is established in another domicile, the only implication being that it must not be a divorce by consent.

So that it is clear the statute contemplates nothing but a compensation to the widow for being forced to lose her husband through his breach of marital duty; and when the dissolution takes place the title accrues—it is immaterial by what court, domestic or foreign, the decree of dissolution is rendered if it is such a decree as our statute prescribes. It is made strictly analogous to and is a substitute for the dower given the widow on dissolution of the marriage by decree of God—by death. The happening, too, of this divorce contingency enlarges the dower provision to a fee in the thirds; for, as Mr. Bishop says (2 B., § 481), the wife "should not be left in a worse condition than if death instead of divorce had dissolved the connection."

Therefore, the sole condition precedent to the vesting of this title prescribed by our Statute is that the prevailing party shall have prayed for and obtained a dissolution of the marriage by decree of divorce, which decree must be such an one as our Statute prescribes, to-wit: (1) by judicial sentence; (2) on full jurisdiction and not *ex parte*, and (3) upon judicial contention about a cause of divorce arising out of the violation by the other party of the marital duties prescribed by the law of the domicile. When such a divorce decree is obtained in any jurisdiction, it is such a dissolution of the marriage as is allowed by our

Statute (and not by a foreign statute) to carry with it the rights of thirds in realty here, prescribed by a general rule of property established in our jurisdiction and founded on the domestic relations. Still it is not the decree of divorce that gives the title; for the land need not he mentioned in the decree. It is the status of widowhood by decree of divorce—instead of decree of death—the fulfillment of the condition precedent that gives the title; this condition or status being created by any sister State court having full jurisdiction as well as by our domestic courts.

OBJECTIONS ANSWERED.

But the court agreeing to the proposition that the fact of dissolution of the marriage at the plaintiffs' prayer is the sole condition on which the title is, by the Statute, made to vest, still thought the Legislature meant to limit this benefit to widows made such by Oregon State Courts. This position, plausible at first view and originally taken by the court without argument of counsel, cannot be maintained. Since we have seen there is no condition precedent limiting that right to such as are divorced for causes of divorce prescribed by our statute and since, if it was limited to such causes, that would not confine the right to Oregon decrees (as we shall see), but decrees for any such cause in another State would equally give the right to thirds, it is difficult to see any reason for limiting it to such dissolutions as are decreed by our courts; for it is not the decree nor its peculiarity of procedure that vests the title but only the status of being a divorced person, as is agreed. It cannot be denied that a court of a sister State can as effectually dissolve the marriage relations of persons subject to its jurisdiction as ours; nor can it be denied that the U. S. Constitution compels our courts to give as full effect to such decree of a court of a sister State as it has in that

State (2 B. M. and D., § 199 c). Nor can it be denied, as we have seen, that the *lex domicilii* creates marital obligations the violation of which will entitle to divorce and the rights depending thereon will be enforced in our courts and the divorce there had, on full jurisdiction, will have full effect here. (See 5 Or. 411, Barrett vs. Barrett). No reason then appears in principle for limiting it to decrees by our courts.

Still the court suggests that to allow such a right to result from a dissolution of the marriage by a California State court would be to give an extra territorial effect to the laws of that State and put our State policy on the subject of divorces at the mercy of the laws of that State. The analogy of foreign money judgments evidently led to this misconception. It is not disputed that the latter judgments must be sued on here and converted into domestic judgments before a docket lien can be acquired or an execution issued to enforce it. But the *fact* of indebtedness is settled by such a judgment in the California court and cannot be denied here. It is not pretended that the divorce decree itself has any operation here, but the *fact* of *dissolution* of the marriage has. The decree is *in rem* on the status of marriage, and on full jurisdiction is binding everywhere (9 Wal., 108; 2 B. M. and D., § 755), like a decree on the title to a ship, or a judgment between parties as to the title to a horse. (See § 665, Wharton on Confl. of Laws). The title to the thirds is not given by the California decree, but is given by our own Statute upon the existence of a *fact*, viz: a personal status, the dissolution of the marriage relation by divorce decree on full jurisdiction, which we have seen can be as effectually decreed in a California court as in ours; indeed can only be established by the California court if that is the court of the domicile. Hence the only inquiry is whether the dissolution is by

such a decree as our statute prescribes, that is, a decree of divorce (by any court) on full jurisdiction for a lawful cause prescribed by the law of the domicile. It is our statute that creates the right and not any extra territorial force of the California law.

ON AUTHORITY.

So the general rule of the common law is opposed to limiting this rule of property to decrees by our courts. Mr. Story, in his Conflict of Laws, § 230 (b) says:

"In respect to real or immovable property *the same effects* would in general be attributed to such divorce as would ordinarily belong to a divorce of the same sort by the *lex rei sitae* If a *dissolution of the marriage* would there be consequent upon such *divorce*, and would there extinguish the right of dower, or of tenancy by the curtesy, *then the like effects* would be attributed to the foreign divorce which worked *a like dissolution* of the marriage."

There can be no difference in the principle where rights *accrue* by virtue of the divorce; for, indeed, where dower is extinguished its value *accrues* to the owner of the land—the husband. So, too, that most lucid and logical jurist, Mr. Joel Prentiss Bishop, in 1 Bish. M. and D., § 404, says: "In respect to real estate the rights of the parties to the marriage are * * * regulated by the law of the place where the land lies," and the same practically in 2 B. Law M. W., §§ 576, 584.

So, too, the specific doctrine claimed in this case was declared by the learned court in 9 Me., 145, Harding vs. Alden, in a case where the foreign divorce was even *ex parte*. It was assumed in that case as indisputable law that if the divorce was on full jurisdiction, the statutory thirds for life would result in precisely the same manner as if it had been a domestic divorce in Maine, because (mark the *reason*) then there would be, unquestionably, a "dissolution of the marriage" in Maine as well as everywhere.

But the reason why any question arose as to the vesting
the thirds in that case was because of the dispute wheth
the *ex parte* divorce in Rhode Island did by the law
Maine create a dissolution of the marriage as to the othe
party in Maine. In a word, whether it was such a divorc
as was prescribed by the Maine statute as one to which th
Maine statute accorded thirds. It was for that reason
the Maine court said that, as it regarded it as a divorce
for both parties and binding on all the world, and since
the Maine statute did not in express terms exclude *ex*
parte divorces, but used general language sufficient
to embrace such an *ex parte* foreign divorce, it
would hold that the right to thirds accrued on such a di-
vorce—that it was a compliance with the condition prece-
dent. Its decision was made nearly fifty years ago (1832),
and it has been quoted by Cooley, Kent, Bishop (2 *B. M.*
& D., §§ 141, 160, 169, 709, 711; 2 *Kent*, 111 *n*; *Cooley*,
Const., *Lim.* PASSIM) and all the great authorities as a
leading case. Its assumption that in every case where a
divorce on full jurisdiction was had the property rights
hanging on the snapping of the *vinculum* would be the
same as in the case of a similar divorce in the *lex rei sitae*,
has never been questioned. On the contrary, it has been
invariably admitted, as for instance in the above quotation
from Story's Confl. of Laws, § 230 b. "If a *dissolution of*
the marriage would there be consequent upon *such*
divorce * * * and would these extinguish dower
* * * *the like effects would* be attributed to the
foreign divorce which worked a *like dissolution of the*
marriage." The only dispute has been whether *ex*
parte foreign divorces carried these property rights.
Mr. Bishop (2 B. M. and D., sec. 169 to 199 c., and sec.
711) discusses this last question at length and with keen
and critical analysis, and reconciles all the authorities on

the proposition that the Maine court is correct, by the statement, finally, that if in such cases, the legislature of the domestic forum chooses to do so absurd a thing, it may declare that upon such *ex parte* divorces, no dissolution of the marriage has taken place as to the person in their domicile, although he has no wife, or the courts may construe such to have been the meaning of the legislature, (as we have seen has been done by our statute,) and in that case the property rights dependent on the snapping of the vinculem do not flow to the prevailing party in the foreign *ex parte* divorce, *because no dissolution* of the marriage has taken place as to the "other party,, within the intendment of the statute. His language (Sec. 199 c.,) is "according to the principles developed in the foregoing sub-title of this chapter if there was the domicile necessary to give the jurisdiction, and the defendant appeared to the suit, then the judgment would be everywhere in our country of absolute force, both as to the status of marriage, and other like property rights" hanging on the vinculum; which is our case in a nutshell. In the case at bar, there was domicile of the plaintiff and the defendant appeared and defended, and there was a complete dissalution of the marriage according to every authority; for which, see 9 Wall 108.

So, too, the case of Gould vs. Crow, 57 Mo. 200, is a decision directly in point affirming 9 Me. 145. It, too, was an *ex parte* divorce of a sister state, and the language of the Missouri statute being general and not excluding such *ex parte* divorces, expressly or impliedly, it was held that it was such a divorce as was contemplated by the statute. See also, IV. Phil. International Law, §508, p. 336. 10 Mass., 260, cited in Chicago Legal News, 356, (Roth vs. Ehman) July 9, 1881.

STATUTORY CONSTRUCTION.

If the legislature meant what the statute says, there can be no room for any construction. The circuit court placed its construction upon the ground that the policy of the State rather than the words of the statute required the limitation to divorces granted by the courts of this State; but "what is termed the *policy* of the government with reference to any particular legislation, *is too unstable a ground* upon which *to rest* the judgment of the Court in the interpretation of the statutes." 5 Wall. 107; and "Courts will not look into the wisdom or policy of a statute to give it any meaning not apparent on its face." 9 Neb. 468. The words "shall be entitled in all cases" are "general and comprehensive in character, and should receive a general construction" 35Cal. 634. "The best rule by which to arrive at the meaning and intention of a law, is to abide by the *words* which the law makers have used" 4 McLean, 463. 5 McLean 178, Dev. C. C. 158. In order to sustain the construction of the circuit court, the statute should read "whenever a marriage shall be declared dissolved [by the courts of this state] the party, etc., shall be entitled," Dennick vs. R. R. Co,, 13 Otto 19.

PRIVILEGES AND IMMUNITIES.

Indeed as such a law is a general rule of property affecting all the property of all the citizens of the State, domiciled citizens of a sister state, divorced by its laws, could not constitutionally be excepted from the operation of the law of the domestic forum *in like cases of divorce* (2 B. M. & D. Sec. 199 c.) It could only be by basing it on some good reason, as by construing the statute to mean all divorces on full jurisdiction, and not *ex parte* divorces. The exclusion could not be based on the ground that the divorce was granted and the dissolution of a marriage decreed in the courts of the sister state. This would be most

manifestly in defiance of Art. IV. Sec. 2 of the U. S. Constitution: "The citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." For as was expressly admitted by the court (Deady J.) in the last argument, it would be a practical exclusion of a California citizen from the benefit of this rule of property, except on the sole condition that he or she would became a citizen of Oregon by twelve months inhabitancy or domicile *animo manendi*, which is citizenship under the U. S. Constitution, (See Evart's brief 12 Wall. 421) and is therefore a discrimination based on state citizenship. The laws of dower and curtesy on death, and heirship, are all in the same category as this; and there is no question, we think, that, as to these last named, no such discrimination could be made. It is true the state may abolish all these rights, and rules of property, but if they exist for the citizens of the forum they must exist for every citizen of any of the United States. On this subject we cite the authorities in our M. S. brief, to wit: Story on the Const. Sec. 180 c. III. U. S. Dig. O. S. 303; 10 Mo. 581; 2 Munf. (Va.) 398; 3 Har. & Mr (Md.) 554; 8 Wall. 177; 180; 43 Cal. 49–50; 16 Wall. 76; 12 Wall. 421; 3 Otto 77; 20 N. Y. 608. (Also Gen. Sherman's late speech at Atlanta Ga.)

As we have said before, the right may be based on the cause of divorce, as it was prior to 1865, but whenever a divorce coming *exactly within the terms* of the statutory provision is had or rendered in a sister state in favor of its citizens, it must have the same effect or create the same status here as there, and must entitle that citizen to the same resulting property rights, as the like divorce does here; as tersely stated by Mr. Bishop (in 2 B. M. & D., 199 c.) And this brings us to consider

THE OLD LAW, THE EVIL AND THE REMEDY.

The OLD LAW limited the accrual of this property right, which was then only dower or curtesy proper, to such divorces as were for two causes, and was in substance as follows: Whenever a marriage shall be declared dissolved on account of the adultery or conviction of a felony of either party, the adverse party shall be entitled to dower or curtesy as the case may be "the same as if the other party were dead." And under the same Oregon statute then (as now) dower was declaled not to be limited to residents of this state, but applicable to all, including aliens. And such was the general law (except as to aliens) (1 Bish. M. & D. Sec. 404, 2 ib. Sec. 575.) Under this law it is manifest this statutory provision was dower itself by express naming of the statute *accruing earlier* upon a new contingency, and had every quality of dower, except that it vested on the divorce, when the husband was to be considered the same as dead to her. It is likewise manifest that the statute vesting it with all the *qualities* of dower (which embraced non residents) made widows, by foreign decrees, for either cause, equally entitled as if by domestic decrees. Not only is this so by express statute, but 9 Me. 145 is in every particular, the same as to the nature of the provision, ground of divorce, and langnage of the statute. As it holds that a foreign decree, even *ex parte*, for either cause entitles to dower thirds, there can remain no doubt that our OLD LAW was not confined to decrees by Oregon courts but extended to any foreign decree. That old law, like the present section, was in the code of procedure.

THE EVIL was that it limited this statutory dower, or thirds to a dissolution for the two causes, whereas the true principle was that the wife who was forced to become a widow, for *any fault* [what was a "fault" to be determined

by the law of the domicile] of her husband was as much entitled to the dower, as if the cause were adultery, because it was the "widow" who was to be provided for. It was the fact of his being "dead" to her that entitled her to dower. It was also an evil that in such cases there was an unfair inequality between the provision for the wife and that for the husband. No other evil is apparent and no other was to be remedied.

HENCE THE REMEDY was to extend it to all causes of divorce, not only in all cases provided for in and arising under our statute, but to all other cases under the law of the matrimonial domicile, for since each state was exclusively interested in the marriage status of its domiciled subjects and had exclusive jurisdiction of that status there was no reason why the fixing of the causes that justsfied a wife in dissolving the marriage, should not be left to the *lex domicilii*. Oregon was not interested in their status, nor in their causes of divorce. It cannot be fairly said that this would militate against our policy in regard to causes of divorce, for we have no concern with the marriage status and obligations of the citizens or domiciled subjects of other countries; and if our statute had confined this rule of property to divorces for causes allowed by our state, only, it might be fairly regarded as a sentimental interference with marriage relations with which we had nothing to do. Besides if such had been the wish of our law makers, it would have been very easy, instead of the words "in all cases," to have said "for all causes now or hereafter, provided for by the statutes of this state." and thus have limited the right of foreign subjects, or citizens of sister states to a share in this rule of property, only when divorced for causes which *we* thought right. But if so limited to our causes of divorce, it seems plain that foreign divorces for such causes would have like results here, equally

as if limited only to adulery. Yet the court (Deady J.) on the last argument expressly admitted that the letter of the statute, "in all cases," extended to every cause allowed in any domicile. But to say that public policy requires the court to limit it to "all cases decided in the courts of Oregon," would limit the "cases" to fewer than those for "causes" allowed by our law, for it would prevent the operation here of foreign decrees of divorce, for adultery for instance, or any cause recognized by our statute, even though the domiciled persons were really citizens of this state, and in this manner make the remedy narrower than it was before, although there was no evil that required it, and no reason for so doing. Hence, while the general language "whenever a marriage shall be dissolved" would have been sufficient to have embraced all foreign decrees, there seems to have been extra precaution taken to prevent any doubt by using the words, "in all cases," meaning literally every case of divorce wherever decreed, and for any legal cause. Thus giving a remedy coextensive with the evil and in accordance with all the principles of the law of divorce and in harmony with the spirit of our Federal Constitution.

NATURE OF THE PROVISION.

It may be added that this provision of thirds is in the nature of dower and is not a penalty. Prior to 1865, it was, in this state, dower itself (or curtesy) vesting before death of the other party, by the happening of another contingency viz: dissolution of the marriage by divorce. Since 1865, it is dower enlarged, as well as vesting, by the happening of the above named contingency from a third for life to a third in fee. Indeed there is no difference in principle between dower and this provision prior to the vesting of the estate, for dower as well as this provision

was subject to be destroyed by the legislature before it vested even though the marriage was entered into after the provision was in the law; so says Mr. Bishop (2 B. M. & D. Sec. 199) "the more solid opinion appears to be that marriage is not included in the constitutional provision" against impairing the obligation of contracts, citing Deady 268, and numerous other authorities. So Mr. Bishop recognizes this as a dower provision in 2 B. M. & D. Sec. 481 where he says the wife "should not stand worse than if death instead of *divorce* had dissolved the connection." It plainly was dower, and not a penalty in 1863—enlarging the provision in 1865 did not change its nature from a dower right to a penalty, and the fact that it is a fixed amount prescribed by the statute for all cases shows that it is not damages, because the damages would be proportioned to the injury in each case. It is true the will of the statute to regard the violator of the marital duties as dead to the other, is based on the idea that he has wronged her, yet the final conclusion is not that he must pay damages, but, being dead to her, his estate must furnish a dower provision. At any rate it was treated as a dower provision by the courts in Maine and Missouri, and by Mr. Bishop, and no court has ever yet held it as a penalty, and hence as a criminal law, not affecting persons divorced in other jurisdictions. But whether regarded as a penalty or not, it would be still a general rule of property affecting realty and depending on the domestic relations; and hence making it immaterial, when and where the domestic status of the owners was changed—whether at home, or in a foreign state; by death or by divorce. Another conclusive reason why this is not a penalty, is that the latter must be ascertained and decreed by judgment, for the amount before it can be operative, while here it does not require a judg-